THE ANCIENT HEBREW LAW OF HOMICIDE*

By Mayer Sulzberger, Philadelphia.

IV

In all the Biblical literature there is no mention that a *go'el* ever killed anybody, nor, indeed, is the term *go'el ha-dam* used in any other than the legal passages cited, and the historical notes relating thereto, save in one instance.

Absalom, having murdered his brother, Amnon, fled from the royal court to his maternal grandfather, King Talmai of Geshur, with whom he stayed for three years.

David's general-in-chief, Joab, was a partisan of Absalom, and favoured him for the succession to the throne. Exile was fatal to such pretensions, and Joab schemed for his recall.

Joab was a masterful character, skilled in diplomacy and great in war, who, in general, accomplished what he set out to do. For good reason he did not himself ask David to pardon Absalom, but contrived to put the matter to David through the agency of a wise woman (*ishah ḥakamah*).

Exactly what an *ishah ḥakamah* was is not clear. There are but two of them in the Bible, and both have dealings with Joab. One is tempted to opine that there were legends current in Israel concerning such women, and that the story we are now considering was one of the series. The wise woman of Abel-beth-maacah (2 Sam. 20. 18) treated with Joab, caused him to raise the siege, and saved the city. Her wit persuaded Joab, her wisdom controlled her towns-

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men. And now Joab entrusted a most delicate diplomatic negotiation to another *ishah ḥakamah*, her of Tekoa. Abel-beth-maacah was in the north; Tekoa was in the south.

The story is well told. Joab knew that David longed for Absalom, but would not recall him because he deserved the punishment he was undergoing. The point was to persuade the king that the time had come to pardon the delinquent.

Joab carefully instructed his wise woman. She was to be a mourning widow, one of whose sons had murdered the other. Justice demanded that the murderer should be executed, and his only son likewise. If this was done, her beloved husband's name and family would be totally extinct. She therefore implored him to stay the hand of justice and in his mercy grant a pardon. Her tears and prayers prevailed, and the king swore the great oath (*ḥai-ℑHVH*) that her son would be saved.

Now was the moment to remind David that he who would pardon the criminal of another family should do the same by his own, especially in view of the fact that the people desired it.

The king at once taxed her with being Joab's envoy, and she owned that she was. Her work, however, was well done. She had persuaded the king to yield to his longing. Joab was sent for and given leave to bring Absalom home.

It is in the course of the woman's fictitious story that she uses the term *go'el ha-dam*. The people who demanded justice against the murderer are called *kol-ha-mishpaḥah*, the ordinary meaning of which would be her husband's brothers and their descendants. The language ascribed to them is peculiar. They all speak together, and they do not address themselves to the *zikne ha-'ir* or to any other authority,

but to a lone widow who is assumed to have the guardianship of her son, who is himself the father of a boy. Their expressed desire is to kill the murderer and his son (*unmitehu be-nefesh aḥiw asher harag we-nashmidah gam et ha-yoresh*) (2 Sam. 14. 7). So runs the story. The king bids her go home, that she shall not be troubled, and then she goes on to pray that the *go'el ha-dam* may no longer destroy, that *they* may not destroy her son (14. 11).

The whole story is obscure, though the account may omit circumstances which would have made it more plausible. The woman may, for instance, have represented herself as coming from a remote place in the northern mountains, where lawlessness prevailed, and where the whole royal power was needed to enforce law. At all events, the touch which says that the community in which she lives is unable to act without her help rather strains belief. Moreover, they do not speak of any one executing the culprit but themselves, in the plural. It is she who bethinks herself of the *go'el ha-dam*, and asks that *he* be restrained, in order that *they* might not kill her son.

If her application is, as it appears to be, for pardon, she says nothing that is inconsistent with the theory that she fears legal prosecution and conviction and the consequent death of her son at the hands of the *go'el ha-dam*, the federal executioner. On this view her conduct is natural, since she asks the king to stay the hand of his own officer.

Above all, it is necessary to remember that the whole is a piece of Joab's biography, intended to exalt his diplomatic wisdom. Biographies are often romantic, and in the case of popular heroes are from time to time retouched. When this story took its present shape may not be easy to

determine. In any event, it can scarcely be looked on as authority for law in the time of David. If we had the biography of Joab from which this story was probably extracted, the difficulties of interpretation might readily disappear. It is significant, however, that the *go'el ha-dam* is never spoken of in the literature after Joab. He was also the last who took refuge by the Altar in Jerusalem, and his death in that holy place marked the downfall of the whole idea of sanctuary.

The general conclusions which we have reached concerning the *go'el ha-dam* and the *'ir miḳlaṭ*, as stages in an extensive law reform, demand that the results of this movement be ascertained.

Its end was the establishment of a federal court in every canton of the land, each of which had executive officers to execute its judgements. 'Judges (*shofeṭim*) and officers (*shoṭerim*) appoint in every one of thy cities (*she-'areka*), who shall judge the people with just judgement (*mishpaṭ-ṣedeḳ*)' (Deut. 16. 18).

It was Jehoshaphat (873–849 B.C.) who, after a hundred years, gave to the grandiose conceptions of Solomon the final touch which assured their triumph.

The story is told in 2 Chronicles.

He began his reign by placing garrisons in all the *'arim* of Judah, and in the *'arim* of Ephraim that had been taken by his father Asa (17. 2). In the third year he sent his *sarim* (princes) into every corner of the land to instruct in the *'are Yehudah* (17. 7), and with them he sent legal experts (Levites and *kohanim*) to re-enforce their statesman-like arguments with the statement of the principles and practices of the Hebrew law, and they taught in Judah, carrying with them the *sefer torat ℑHVH*, and went about

through all the *'are Yehudah* and taught the people (17. 8, 9).

When the ground was thus carefully prepared and there were sufficient forces everywhere to assure obedience, he took the final step. He set judges (*shofeṭim*) in the land, in all the *'arim* of Judah, city by city (19. 5).

Moreover, he established a supreme court in Jerusalem, composed of Levites, *kohanim*, and eminent chiefs to administer *mishpaṭ JHVH*, and the ordinary *rib* (suits) (19. 8).

For cases concerning the king's revenues or estates, the court had a special president (*Nagid*), Zebadiah ben Ishmael, who was doubtless the king's confidential minister.

The jurisdiction of the court was appellate only. There is no hint of original jurisdiction, even in matters royal. The wording is unmistakable. Every *rib* (cause) which will come up to you from your brethren in the several *'arim* ye shall instruct them so that they trespass not against JHVH and so wrath come upon *you*. And the causes are thus classed: *ben dam le-dam* (homicide cases, whether murder or manslaughter); *ben torah le-miṣwah, le-huḳḳim u-le-mishpaṭim* (this comprehends all other classes of cases).

The establishment of this appellate tribunal at Jerusalem is described at large in Deuteronomy. The charge, however, which in Chronicles is addressed to the judges of the supreme court, is here directed to the judges of the courts of first instance in the several *'arim*.

If there arises a case (*dabar la-mishpaṭ*) of murder or manslaughter (*ben dam le-dam*) or any other cause (*ben din le-din uben nega' la-nega'*, *dibre ribot*), or any law, or an assault, any controversy in thy cities (*bishe'areka*), arise and go up to the *maḳom* which JHVH thy God will choose

for thee (Jerusalem). Go to the *Kohanim*, the Levites, and the *shofeṭ* then in office, and inquire, and they shall instruct thee as to the law. According to their pronouncement thou shalt act, being heedful to obey exactly. According to the *torah* which they shall teach thee, and according to the *mishpaṭ* which they shall tell thee, must thou act, swerving therefrom neither to the right nor the left. And he that will act contumaciously (*be-zadon*), not heeding the *Kohen* standing to minister there before JHVH thy God, or the *shofeṭ*, that man shall die that evil may be removed from Israel. And the whole people shall hear and fear, that there be no more contumacy (Deut. 17. 8–13).

Great care was exercised to give specific instructions for the guidance of these judges in the *'arim*. They must have constituted an elaborate little code, fragments of which are still preserved.

One of the most interesting is in Exodus.

Do not heed a popular cry to convict nor decide a cause, either to please the powerful (*rabbim*), or to favour the poor (*dal*, *ebyon*) (Exod. 23. 2, 3, 6).

Abhor a false cause, nor condemn to death the *naḳi* (once acquitted), or the *ṣaddiḳ* (one that is innocent). The guilty cannot escape the justice of heaven (Exod. 23. 7).

Take no gift (*shoḥad*). It blindeth the wise and perverteth the cause of the innocent (*dibre ṣaddiḳim*) (Exod. 23. 8).

Do not oppress a *ger*; ye know a *ger's* life; ye were yourselves *gerim* in Egypt (Exod. 23. 9).

Here is another from Leviticus:

Do no unrighteousness in *mishpaṭ*; respect not the person of the poor (*dal*), nor honour the person of the mighty (*gadol*). Judge in righteousness (*be-ṣedeḳ*) (Lev. 19. 15).

Be not a prosecutor (*rakil*), nor be thou eager for thy neighbour's blood (19. 16).

Hate not thy brother in thy heart, nor wantonly rebuke him, nor fasten guilt upon him (19. 17).

Nurse no vengeance or grudge, but love thy neighbour as thyself (19. 11). Do no unrighteousness in *mishpaṭ* with respect to *middah* (measurement), to *mishḳal* (weight), or to *mesurah* (content) (19. 35).

Deuteronomy has several.

Moses says: I charged your *shofeṭim* at that time: Hear both sides (*shamoa' ben aḥekem*) and judge righteously (*ṣedeḳ*) between them, *ezraḥ* or *ger* (Israelite or non-Israelite) (Deut. 1. 16).

Do not respect persons in *mishpaṭ*, hear the little as well as the great, fear not the face of man, *mishpaṭ* is of God. The cause that is too hard for you, bring it to me; I will hear it (Deut. 1. 17).

JHVH regardeth not persons nor taketh gifts (*shoḥad*); He deals *mishpaṭ* for the fatherless and the widow, He loves the *ger* (Deut. 10. 17, 18).

Shofeṭim and *shoṭerim* appoint thou in all thy cities (*she'areka*) which JHVH thy God giveth thee to thy tribes, who shall judge the people with just judgement (*mishpaṭ-ṣedeḳ*). Thou shalt not wrest judgement (*mishpaṭ*), nor take a gift (*shoḥad*), for *shoḥad* blindeth the eyes of the wise and perverteth the cause of the innocent (*dibre ṣaddiḳim*). Justice, justice shalt thou follow (Deut. 16. 18–20).

The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers. A man shall be put to death for his own crime (*be-ḥeṭ'o*). Pervert not the *mishpaṭ* of the *ger* nor of the fatherless (Deut. 24. 16, 17).

If men have a controversy (*rib*) and bring it for judgement, the judges shall acquit the innocent (*ṣaddiḳ*) and convict the guilty (*rasha'*) (Deut. 25. 1).

Arur he that taketh *shoḥad* to condemn to death one who was once acquitted (*naḳi*) (Deut. 27. 25; cf. Exod. 23. 7).

That the system so established was complete is manifest. The details in Lev. 19. 35 show that the judges were custodians of standards of weights and measures, and this is an index of the care exercised to judge righteously.

The penalty of death for one kind of bribery appears to be fixed in Deut. 27. 25, and the deliberate disregard of the decision of the supreme court was declared a capital offence in Deut. 17. 12.

With the establishment of this system the whole machinery of sanctuary, of separated city, of *'are miḳlaṭ*, of *go'el ha-dam*, as well as the judicial functions of the *ziḳne ha-'ir*, of the several cities and of the *'Edah*, were swept away, and *kofer* fell into oblivion.

The great question of murder or manslaughter (*ben dam le-dam*) was tried in every *'ir* according to the principles of the Hebrew law, as authoritatively expounded by the supreme court at Jerusalem. All vestiges of Canaanite law disappeared, leaving only a few literary survivals buried in this or that phrase or odd sentence of the legal codes.

When Jehoshaphat died in 849 B.C., he well deserved as an inscription on his monument the words of the Chronicler (2 Chron. 19. 4):

'He went out among the people from Beersheba to Mount Ephraim and brought them back to JHVH, the God of their fathers.'

It is a strange trait of universal history that men who accomplish beneficial changes in the law of their country

remain obscure, while the names of warriors, who often afflict it with miseries, go sounding through the ages. It happens that the men who carried through Jehoshaphat's plans are known. The Chronicler has preserved their names. No one reads them. In this legal essay, however, they deserve to be repeated.

The princes (*sarim*) who led the movement were: Benhail, Obadiah, Zechariah, Nethanel, and Micaiah. The Levites were Shemaiah, Nethaniah, Zebadiah, Asahel, Shemiramoth, Jehonathan, Adonijah, Tobijah, and Tobadonijah; and the priests (*kohanim*) Elishama and Jehoram (2 Chron. 17. 7, 8).

All honour to this great company of statesmen and jurists, benefactors of mankind, and to their master, Jehoshaphat!

It is pleasant to fancy that some such sentiment inspired the prophet Joel to name the place where, on the great day, the nations were to be judged, the Valley of Jehoshaphat (Joel 4. 2, 12).

The firm establishment of the Hebrew law in Judah must have influenced the northern kingdom. Jehoshaphat and the kings of Israel were in close alliance, Jehoshaphat's son and successor married King Ahab's daughter, and the two kingdoms marched peacefully side by side. Nevertheless, the movement for *Torah*, law, was slower in the north than in the south. In our second lecture reference was made to the hostile criticism on this subject uttered a hundred years later by the prophet Amos.

The success of these great reform measures had incidental consequences, in modifying methods of legal procedure, and in rooting out some legal principles which revolted the Hebrew conception of justice.

In Canaanite law the presence of the accused was not necessary. The *zikne ha-'ir* could try and adjudge his case in his absence. Moreover, at such trial the accuser was the all-sufficient witness. Then, too, a man acquitted might be tried again. Twice in jeopardy was no defence.

These features of Canaanite law are inferred from the energetic opposition to them in the *Torah*. That the old law permitted the trial of a person in his absence, appears from the demand of the *anshe ha-'ir* of Ophrah, that Gideon's father should surrender his son for execution, the latter having been convicted of a capital offence. Had he been present, participating in the trial, the demand would have been superfluous (Judges 6. 30).

And there is another similar case under the law of the *zikne ha-'ir*. A woman charged with gross fraud on the marital relation may be tried in her absence and brought out for execution (Deut. 22. 21).

In the Hebrew law a trial in the absence of the defendant was inconceivable. Even in the days of oracle trials, which were not trials in the legal sense, there being no issue between parties, the accused were always present. The reported cases attest this fact (Achan's case, Joshua 7. 14–18; Jonathan's case, 1 Sam. 14. 38–42).

When trials were instituted, the rule was still more strongly insisted on (Deut. 1. 16, 17).

That one witness was all that the Canaanite law required, and that a man might thus be at the mercy of an enemy, is readily inferred from the almost passionate opposition of the Hebrew code to that practice.

'The murderer shall be put to death by the mouth of witnesses. One witness shall not testify against any person to cause him to die' (Num. 35. 30).

'At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; at the mouth of one witness he shall not be put to death. The hands of the witnesses shall be first upon him to put him to death, and afterward the hand of *kol ha-'am*' (Deut. 17. 6, 7).

'One witness shall not rise up against a man for any crime or misdemeanour charged against him; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established' (Deut. 19. 15).

In the Northern Kingdom, which was less zealous than Judah in protecting the Hebrew law against Canaanite infusion, the rule of two witnesses was firmly established in the time of Ahab, the friend and contemporary of Jehoshaphat (1 Kings 21. 10, 18).

So rooted was the idea of two witnesses in the Hebrew mind that when JHVH instructed the prophet Isaiah to take a roll and write in it concerning *Maher-shalal-ḥash-baz*, he did so with two witnesses (Isa. 8. 2). Jeremiah called in subscribing *witnesses* to a deed (Jer. 32. 10, 12), and in his prayer afterwards he refers this fact to the express command of JHVH: Thou didst say to me, O Lord JHVH, Buy the field for money and take *witnesses* (Jer. 32, 25).

That the Canaanite law permitted a man accused and acquitted to be tried again, and convicted and punished, is provable by the same character of evidence. The Hebrew law piles protest upon protest against punishing the *naḳi*, the man once acquitted.

When it is remembered that down to the time of David certain cases were tried by the oracle, it becomes apparent that an acquittal, being recognized as the judgement of Heaven, and as such infallible, was necessarily final and

irreversible, and that another trial for the same offence was inconceivable.

Hence the criminal law has a terminology of its own which brings out necessary distinctions. An innocent man is *ṣaddiḳ*, a guilty one *rasha'*. To acquit the innocent is *hiṣdiḳ*, to convict the guilty is *hirshia'*, to acquit one who has committed a transgression, or to allow him to escape conviction, is *niḳḳah*.

The difference between an innocent man and one legally declared to be innocent by acquittal, is also marked. The former, as has been said, is *ṣaddiḳ* (innocent), the latter is *naḳi* (not guilty).

In this exculpatory verdict there lurked then, as in our own day, the hidden thought which the Scotch broadly speak out by their verdict of *not proven*. This comes out clearly in one of the laws of the judge-code, already referred to: Do not condemn to death the *naḳi* or the *ṣaddiḳ*; for I will not acquit the guilty (Exod. 23. 7). The judge is here exhorted to have no scruples about freeing the *naḳi*, however strongly he may be convinced of his guilt, and of the error which produced the former acquittal. He is forcibly reminded that there is justice in Heaven which corrects human errors. In that tribunal a guilty man cannot plead his former acquittal by an earthly court.

So, too, in Deut. 19. 10. Elaborate provision is there made in order that a man guilty of manslaughter, which is not a capital offence, shall not be put to death. The declared object is that the blood of the *naḳi* shall not be shed, an act which would bring blood-guilt (*damim*) upon the whole community. The man guilty of manslaughter and punishable, therefore, is *naḳi* (acquitted of murder).

Indeed, the word *naḳi* very often means to be *freed*

from something, in contrast with the idea of having been entirely *free* from any connexion with it.

If Abraham's messenger should do his errand and others cause it to fail, he shall be *naḳi* (freed, acquitted) of his obligation (Gen. 24. 41). And the word is used in a like sense in Joshua 2. 17–20. If a man's ox gore a man to death, his owner shall be *naḳi* (i.e. acquitted of guilt under certain circumstances) (Exod. 21. 28–32).

When the community has ceremonially cleared itself of blood-guilt (*nikkapper*) for one slain by an unknown, it prays to be *naḳi* (acquitted) (Deut. 21. 8).

A man whose place is in the army is freed (*naḳi*) from that duty when he has newly married (Deut. 24. 5).

There are many passages which bear out our interpretation of *ṣaddiḳ*, *rasha'*, *hiṣdiḳ*, *hirshia'*, and *niḳḳah*. Here are some of them: 1 Kings 8. 32; 2 Chron. 6. 23; Exod. 21. 28; 22. 8; 23. 8; Deut. 25. 1, 2; Isa. 5. 23; 2 Sam. 14. 9; 15. 4; Exod. 20. 7; Deut. 5. 11; Jer. 30. 11; 46. 28; Amos 2. 6; 5. 12; Joel 4 (3), 21; Nahum 1. 3; Ps. 94. 21; Prov. 17. 15, 23, 26; 18. 5, 17; 19. 5, 9; 24. 24; Job 9. 20; 34. 17.

Perhaps the most objectionable feature of Canaanite law was a remnant of a prehistoric *lex talionis*, which had as a consequence that for the crime of the father, the son might be put to death, and perhaps also that for the crime of the son, his father might be put to death.

The only concrete case on this subject is unfortunately hypothetical, and, worse still, fictitious. The wise woman of Tekoa states the law to be that, when a man who has a son and heir, kills another who has not yet a son and heir, the murderer and his son shall both be put to death. Strange as this may seem, it is quite in the spirit of the

Code of Ḥammurabi. The murderer is punished because of his crime; his son is executed because, if he were not, the murderer's position would be superior to his victim's; whereas the object of the Code is to make the criminal's disadvantage just as great as that suffered by his innocent victim. That the son had done nothing to deserve death was purely irrelevant in a system of laws which judged the guilt, in acts which we look upon as high crimes, by results and not by intentions or motives; which, in short, looked upon penalties, however personal and severe, as being in the nature of damages for private trespasses, demanding just compensation, regardless of motive. That children were in some sense the father's chattels, and not free citizens of the state, is a proposition involved in the other. Their feelings or sufferings did not enter into the legal thought of the Ḥammurabi Code. Hence, when a man's son was doomed to death for his father's offence, it was the father who was being punished, just as if he had been deprived of a slave, of a ship, or of any other valuable chattel.

This principle was repellent to Hebrew law, being in direct opposition to the Hebrew thought that before inflicting capital punishment for homicide, the murderous intent, the malice aforethought, of the perpetrator must be established. The rule of individual responsibility thus laid down, swept away all laws based on the contrary principle. Nothing was, however, left to inference. It was set down in plain and unmistakable words. Hence the declaration:

Fathers shall not be put to death for children, nor children be put to death for their fathers. For his own crime only can a man be put to death (Deut. 14. 16; 2 Kings 14. 6; 2 Chron. 25. 4).

Ezekiel, too, incidentally refers to the subject. He is

addressing his fellow exiles in Babylonia (*c.* 590 B.C.). He finds that their patriotic spirit has been weakened, and that they are settling down to the belief that the nation will never be restored to its home. In short, they are comfortable and quite content to remain in the new land. Verbally, however, they declare the Exile a calamity, and invent reasons why they are so severely punished. It is the fault of their ancestors, who, while they ruled the land of Israel, failed in duty to JHVH. It is this insincere casuistry which Ezekiel is belabouring. He reproaches them with applying to their circumstances a heartless and untrue popular saying: The fathers have eaten sour grapes, and the children's teeth are set on edge. He intimates that they are absorbing alien ideas and setting them higher than the wisdom of their ancestors; that they are quoting alien proverbs, and wrathfully exclaims: What mean ye, that ye use this proverb concerning the land of Israel? And then he delivers JHVH'S message, that every individual soul is the Lord's, and goes on with a subtle satire on Babylonian legal conceptions, which are at the bottom of the objectionable proverb: The man that is guilty shall be put to death. If a man be innocent and do what is lawful and right, he is innocent (*ṣaddiḳ*) and shall live, saith JHVH. If his son violates every law and right, he shall be put to death; upon him is the blood-guilt (*damaw bo*). If this wicked son beget a good son, who does what is lawful and right, he shall not be put to death for his father's crime. He shall live. It is the guilty father who must die for his own crimes. Turning on his audience, he tells them that their flippant use of the proverb, in effect, means that the son should be punished for his father's crime, whereas every man is answerable for himself.

And in his peroration he urges them to make for themselves a new heart and a new spirit, and Israel will revive (Ezek. 18. 1–32).

It was the strong assimilative bent of the Babylonian *Golah* which he deplored and was chastising, and in doing so he brought home to them the inferiority of Babylonian justice as compared with Hebrew justice. That he had in mind certain provisions of the Code of Ḥammurabi is scarcely to be doubted (Lecture I, Secs. 116, 210, and 230 of that code).

It was Zionism which Ezekiel was preaching, to rather dull ears, as it seemed to him.

The nations (*goyim*) shall know that I am JHVH, and I will take you from among their midst, will gather you out of all lands, and will restore you to your own land (36. 23, 24).

And the climax of his optimistic eloquence on this theme was reached in his 37th chapter, that wonderful description of the reanimation of the scattered dry bones into a glowing and glorious organism (37. 1–14).

Perhaps the most important and far-reaching of the secondary conflicts between Canaanite law and Hebrew law, arose over the question of the killing of a slave. First-hand knowledge of the former we have none. There is, however, the Ḥammurabi Code, which at least gives us information as to the state of west-Asiatic law a thousand years before the Hebrew conquest of Canaan, and the influence of which must have been appreciable in Palestine.

According to it, there were at least three contingencies to be considered. The slave might have been killed by a freeman other than his master, by a slave or by the master himself.

The whole tenor of the Code shows that the resolutions were as follows. The freeman who killed another man's slave had to furnish another in his stead or pay his value, to wit, one-third of a mina of silver (Secs. 116, 219, 231, 252). This appears to have been the money value of a slave male or female (Secs. 116, 214).

If a slave killed another man's slave, there is nothing in the Code to make his master answerable, in money or otherwise. Nor is there any indication that the slave was punished, except perhaps by the loss of his ear or his ears. The Code had great regard for property, and slaves were property. The only punishment that could be inflicted on them, without materially reducing their working-power and consequent value, was cutting off their ears. Accordingly, we learn that if he have struck the cheek of a freedman (Sec. 205), or have repudiated his master (Sec. 282), in either case he loses his ear. That the fear of abating his value controlled the policy of the statute, appears from the fact that where an assault by a freeman is punishable by mutilation, it is the offending hands that are cut off (Secs. 195, 218, 226), and where a freeman has spoken that which is criminal, it is his guilty tongue that is cut out (Sec. 192).

As the Code does not treat of homicide, it throws no direct light on the question of what would happen to the master if he killed his slave. The general principle, however, is clear, that the slave is the mere chattel of the master. If any one kills or maims him, he must pay the master, who, according to the law, is the only one that suffers legal injury (Secs. 116, 219, 231, 252, 199, 213, 220, 232).

Another noticeable fact is that while assaults without evil consequences are punished if committed on gentlemen or freedmen (Secs. 202, 203, 204), there is nothing said about

an assault on a slave, evidently on the principle that if his value has not been impaired, his master has suffered no injury, and he himself is legally incapable to sustain legal injury, *injuria*.

We may fairly conclude that according to the Ḥammurabi Code, if a man killed his slave it was his own concern purely. He was the only loser.

Whether the Canaanite law of 1000 B.C. was like the Ḥammurabi Code is impossible to know, but that it had points of resemblance to it may fairly be inferred from the attitude of the Hebrew law on the subject.

Exod. 21. 20, 21, 26, 27, 32 is an important little slave-code. It declares as a principle that the slave is the master's property (*kaspo hu*) (21. 21), and then proceeds to enact exceptions which destroy the rule.

They are as follows:

Exod. 21. 20. If a man smite his male slave (*'ebed*) or his female slave (*amah*) with a rod (*shebeṭ*) and death is produced under his hand, *naḳom yinnaḳem* (Authorized Version: he shall be surely punished).

Exod. 21. 21. Notwithstanding if he continue a day or two (*yom o yomayim*), *lo yuḳḳam* (Authorized Version: he shall not be punished), for he is his money (*ki kaspo hu*).

Exod. 21. 26. And if a man smite the eye of his male slave (*'ebed*) or the eye of his female slave (*amah*) that it be destroyed, he must free him.

Exod. 21. 27. And if he smite out the tooth of his male slave (*'ebed*) or the tooth of his female slave (*amah*), he must free him.

Exod. 21. 32. If a goring ox push (to death) a male slave (*'ebed*) or a female slave (*amah*), the owner of

the ox shall pay unto the owner of the slave thirty shekels of silver, and the ox shall be stoned (to death).

The significance of this Code is that the slave is recognized as a member of society, and certain acts injurious to him are declared to be crimes against the state and punishable by it. If he be maimed by the master so that he loses an eye or a tooth, the state frees him. If he be murdered by the master, there is nothing to exempt the latter from the operation of the general law, which punishes that crime with death. If, however, he die under his master's hand in consequence of the latter's whipping, it is not murder punishable by death, but it is a crime, and the state inflicts a punishment, *nakom yinnakem*, whose nature we shall discuss in the next lecture. If, however, he do not die till the day after the whipping, there is no punishment.

If the slave be murdered by another, the latter, whatever be his station, is undoubtedly guilty of a capital offence.

If, however, he be killed by a goring ox, under the circumstances, which in the case of a freeman's death would entail the payment of vindictive damages (*kofer*, *wergild*), the owner of the ox merely pays the owner of the slave thirty silver shekels and the ox is stoned.

When we consider the provisions of this little slave-code in the light of all the authorities, there is much material for reflection. When the Hebrews acquired the land of Canaan they found slavery in existence, and were unable to abolish it. That this failure was a severe blow to the Hebrew authorities the whole literature attests. Upon every occasion it is declared that escape from Egyptian slavery was the beginning of JHVH's kingdom in Canaan, and that freedom is the foundation of JHVH's commonwealth.

Remember this day in which ye came out from

Egypt, out of the house of slavery (*bet 'abadim*) (Exod. 13. 3, 14; 20, 2; Deut. 5. 6).

I am JHVH, your *Elohim*, who brought you forth out of the land of Egypt that ye should not be their slaves ('*abadim*), and I have broken the bonds of your yoke and made you go upright (Lev. 26. 13).

Thou shalt say unto thy son: We were Pharaoh's slaves ('*abadim*) in Egypt, and JHVH brought us out of Egypt with a mighty hand (Deut. 6. 21; 7. 8).

Lest thine heart be lifted up, and thou forget JHVH, thy *Elohim*, who brought thee forth out of the land of Egypt, from the house of slavery (*bet 'abadim*) (Deut. 8. 14; 13. 6 (5); 13. 11 (10)).

I brought thee up out of the land of Egypt and redeemed thee out of the house of slavery (*bet 'abadim*) (Micah 6. 4).

I made a covenant with your fathers in the day that I brought them forth out of the land of Egypt, out of the house of slavery (*bet 'abadim*), as follows: At the end of seven years let ye go every man his brother a Hebrew, who hath been sold unto ye. And one who hath served you six years send him out free (at the end of the six years) (Jer. 34. 13, 14).

Ye have not hearkened unto me in proclaiming liberty (*deror*) every one to his brother and every one to his neighbour (Jer. 34. 17).

Proclaim liberty (*deror*) throughout all the land unto all the inhabitants thereof (Lev. 25. 10).

Efforts to abolish slavery began at an early day. The first step was to destroy the master's absolute power over the life of the slave, and to convert perpetual slavery into serfdom for a limited period (six years) (21. 2). At this

point the opposition was too great, and the federal government had to yield its principle of the equality of the *ger*. The latter was not included in the serfdom statute. Even in its modified form, the emancipation measure was not completely successful. The masters were powerful enough to compel the government to permit the perpetual slavery of the Hebrew *ezraḥ* by the device of a voluntary contract. A form of procedure was invented (21. 5, 6), by which the policy of the state was overcome. Such a law would have been impossible if the government had felt itself able to resist. The ancient Hebrew jurists saw, just as clearly as do we, that fundamental state policies ought not to become the plaything of the greedy and the ambitious, under any circumstances, and that their nullification by private individuals, whether under the name of contract or otherwise, is inconsistent with the state's sovereignty. Nevertheless, they yielded, because no other course was open to them.

Notwithstanding these drawbacks, the advance made inaugurated an era of human progress.

One who kidnapped a man to enslave him, suffered death (Exod. 21. 16). Ḥammurabi's Code had a similar provision for the protection of freemen (Sec. 14), but its fanatical enthusiasm for slavery was displayed by denouncing the death penalty against one who attempted to free a slave (Secs. 15, 16, 19).

The important point, however, was that for the first time the state made the slave's right to life and limb its own concern. That even in this it had to make concessions is true, but with all its incompleteness, it was the foundation of a new world for the very poor. The lordly classes learned that it was not at their will that the underworld enjoyed life, nor was it within their province to destroy it.

The terms *nefesh*, *ish*, *adam*, *rea'* (man, neighbour) took on a new meaning (Gen. 9. 56; Exod. 21. 12; Lev. 24. 17, 21; Num. 35. 30; Deut. 19. 11; Josh. 20. 3). A slave was at last a man, a *ben-adam*.

In the light of this advance, the halting features of the statute are not as important as at first they seem.

The 20th and 21st verses, which define the crime of a master whose slave dies in consequence of his whipping as less than murder, are in harmony with the general law that without malice aforethought there cannot be murder.

In the case put there is everything to exclude the idea of malice. On the contrary, the master is acting according to his right and, in the thought of that day, according to his duty. It is not the case of a wanton assault; it is a case of lawful whipping, not with anything that caprice or anger may dictate, but with the lawful instrument in general use for that purpose, the rod (*shebeṭ*). If it were any other weapon, the master would no longer have the benefit of this provision, but would come under the general law regulating homicide (Num. 35. 16, 17, 18).

It is true that whipping with the *shebeṭ* sometimes resulted in death, but it was permitted by law, and regulations concerning it were enacted (Deut. 25. 2, 3; 2 Sam. 7. 14). No danger was apprehended from it. 'If thou beatest him with the *shebeṭ*, he will not die' (Prov. 23. 13). Parents were admonished to use it in correcting the faults of their children (Prov. 13. 24; 22. 15; 23. 13; 29. 15). It was therefore the master's usual and proper instrument for disciplining the slave.

In view of the master's pecuniary interest in the life and work of his slave, an intent to disable or kill him could not fairly be presumed. If, therefore, the slave died, the

reasonable presumption was to ascribe the death to his constitutional weakness. And it is this presumption which is embodied in the 21st verse, that if the slave do not die on the day of the whipping, the master goes free. But if he die on the day of the whipping, this presumption is rebutted and overcome, and the master must suffer his punishment.

The effect of this law was to compel the master to remember that in administering punishment, he was in a sense exercising a public function, and that the day for considering it his private affair was over. Just as Deut. 25. 2, 3 prescribed moderation in whipping to courts and their officers, so the statute imposed it on masters.

It is certain that this law did not abolish slavery, but it so ameliorated its features that its gradual disappearance might reasonably be hoped for. That these hopes were never realized to the full, it is needless to say. Every advance of mankind begets a desire for further improvement. This is the immutable law of progress.

When slavery had largely disappeared, economic equality did not result. The freed slaves doubtless fell into the ranks of the *sekirim*, the *dallim*, and the *ebyonim* of later ages, who, with their great spokesmen, the writing prophets, agitated for the betterment of their lot.

There remains for consideration the meaning of the term *naḳom yinnaḳem*, which is the punishment imposed by the law (Exod. 21. 20) on the master whose slave dies during a whipping or afterwards on the same day. This involves a consideration of Hebrew modes of punishment for crimes, and may well be deferred to the next—the last lecture of this series.

V

The notions of punishment, retaliation, and revenge are nearly allied. Revenge is the primitive and unregulated impulse to hurt one who has inflicted an injury. Retaliation is revenge modified by a sense of justice and due proportion. It operates in two ways. Either it inflicts upon the wrong-doer, as nearly as may be, the kind and quantity of harm he has done, or it ascertains the particular portion of his body which has been the instrument of the wrong, and deprives him of it by mutilation. Legal punishment, while it has as basic element the idea underlying the other two, is essentially different in this, that while they keep in mind a certain personal satisfaction to the injured party, it regards nothing but the welfare of the whole community.

Revenge, as a general rule of conduct, necessarily ends when society becomes reasonably organized. It is then that retaliation, the *lex talionis*, is introduced. The state is not yet exercising all of its proper functions, but leaves some of them to be administered by constituent subdivisions, whether they be families, clans, tribes, or guilds.

In doing this it is not neglecting its duty. It has simply not become conscious of it. Early states are all politico-ecclesiastical, that is, they have a civil and ecclesiastical government, however rudimentary, and these constitute the ruling power. By the natural law of self-defence, they resist aggression directed against these functions. Hence it is that the acts which early states recognized as crimes or offences against the commonwealth are those which are of a public nature, a kind of treason against church or state, and they are generally viewed as worthy of death.

Offences against private individuals are, at this stage, looked upon as trespasses, mere civil injuries, with which the community as a whole has no other concern than to preserve the peace, so that the safety of the state may not be endangered. To this end it establishes tribunals which arbitrate between disputants and determine what satisfaction the one shall give the other. This view is so fundamental that even now states do not otherwise interfere between individuals in the great mass of transactions and disputes.

The time comes, however, when states recognize that there are some wrongs inflicted on private individuals which, if not vigorously checked, indirectly sap the foundations of the state. These are then treated as crimes in analogy to those acts which are direct assaults on the state.

Of all the trespasses thus advanced to the degree of crime, the most important is homicide. The advance, however, is not made at one leap; it goes by stages. While the retaliatory state subsists, the individual is never compelled to stand alone. His family, clan, tribe, or guild constitutes a kind of corporation, which assumes the duty of guarding or avenging the lives of its members. Of such corporations there may be many in a state. If a member of one of them kills a member of another, the latter retaliates in kind. There is as yet no sufficient development of comity between these constituent bodies to provide for arbitration, for judicial investigation, and hence the rude justice of the *lex talionis* is established.

If, however, the slayer and the slain are both members of the same subdivision, the rule does not apply. No organization could grow or achieve permanence if it

invariably supplemented the killing of one of its members by the destruction of another in a continuing series. A new interest, the communal, intervenes to regulate private feuds within the organization. Hence arises legal punishment to replace the *lex talionis*.

In a state in this stage of organization, both systems coexist, a rudimentary kind of legal punishment for offences within the subdivision, retaliation for those without.

The superiority of the system which bases punishment on communal policy over that of mere retaliation, becomes apparent by degrees. In time it is fully realized, and then the state withdraws from subordinate organizations the function of dealing with crime and itself assumes it, to the exclusion of all other authority. Then it is that a state may be said to be fully organized.

This form of opinion arises when a country is substantially consolidated, when its inter-clan feuds have been practically abolished, when individual citizens feel themselves in direct and intimate relation with the state, and the state becomes conscious that these citizens are its true and ultimate constituents.

The national mission of keeping the peace between its constituent tribes or clans has been accomplished, and in its place comes the national duty of keeping the peace between its individual citizens. The function of preventing the decimation of one clan by another is replaced by that of preventing one man from killing another. Individual responsibility being established, the mild internal homicide law, which inter-clan hostility created, must be modified so that wilful murder shall be inexorably punished by death, while less guilty kinds of homicide shall not be condoned by mere money payments.

The Ḥammurabi Code shows us Babylonia in the retaliation stage, from which it is scarcely beginning to emerge. It has not yet made homicide the affair of the state. Evidently the *lex talionis* is in full force between the several constituent bodies of the state. As regards minor offences, it has numerous provisions for inflicting on the perpetrator of a personal injury, the same kind of hurt, and has many others for mutilation, by cutting out or cutting off the perpetrator's offending member, the eye for evil looks (Sec. 193), the tongue for evil speech (Sec. 192), the hands for evil blows (Sec. 195), the breasts for a nurse's wrong-doing (Sec. 194), and so on.

It has been many times said, and is constantly repeated, that the *lex talionis* is the law of the *Torah.*

When it is remembered that the Hebrew law provides for a careful trial of the accused, and declares that malice aforethought must be ascertained or the offence is not capital, it is scarcely necessary to repeat that alongside of this law there could not be recognized another which ignores all these points and dooms to death the man who has just escaped the death sentence. The notion that two systems of law so contrary to each other can be applicable in the same case, in the same place, at the same time, is too wild for serious consideration. Yet there is a general opinion that 'the Avenger of Blood' had but to wait outside of the court room until the tribunal had acquitted the prisoner, and that then he lawfully killed him, and that the tribunal acquiesced in this disposition of the case.

It is interesting to trace the history of this widely-diffused error.

There seems to have been in pre-Hebraic times a maxim

professing to sum up in popular speech the character and effect of the law of retaliation. It survives in the Pentateuch in three versions, each somewhat varying from the others. Its origin was probably in the remote past, when it may have been in substantial accord with the law of retaliation as then practised. That it was older than the Ḥammurabi Code is plain. The latter had already advanced to the point that between ordinary citizens it did not demand an eye for an eye, or a tooth for a tooth, but was satisfied with a mina of silver for an eye and a third of a mina of silver for a tooth. Changes in the law, however substantial, do not seem to affect the life of such maxims. Men go on repeating them, unconsciously converting the literal into metaphorical meaning, so as to avoid doing violence to their actual opinions.

Of this truth, the maxim under consideration is a striking illustration. In order that this may be the better understood, we must look not only at the various texts of the maxim, but at the context in which they are embedded. These will show the circumstances under which it was cited, and the purpose of citing it.

The first of the versions is in Exodus, chapter 21. Here are text and context:

Exod. 21. 22. If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mischief follows, *he* shall be surely punished according as the woman's husband will lay upon him; and he shall pay as the judges determine.

21. 23. And if any mischief follow, then thou shalt give life for life (*nefesh taḥat nefesh*).

21. 24. Eye for eye, tooth for tooth, hand for hand, foot for foot.

21. 25. Burning for burning, wound for wound, stripe for stripe.

The Deuteronomy version is contained in the following:

Deut. 19. 16–18 provides for the trial of a witness on the charge of perjury in a trial for the capital offence of *sarah* (*Hebrew Polity*, pp. 51–61).

19. 19. (If convicted) then shall ye do unto him, as he had thought to have done unto his brother; so shalt thou put the evil away from among you.

19. 20. And the rest will hear and fear and will not henceforth commit such evil among you.

19. 21. Have no pity: Life for life (*nefesh be-nefesh*), eye for eye, tooth for tooth, hand for hand, foot for foot.

The Leviticus version is part of a peculiar text, concerning which something was said at the end of the third lecture. It is as follows:

Lev. 24. 10–16 is the report of a trial for blaspheming the *Shem*, the decision and the law promulgated thereupon, that one guilty of that offence must be stoned to death by the *'Edah*, and that the *ger* is just as amenable to this law as the *ezraḥ*.

24. 17. He that killeth any man shall be put to death.

24. 18. He that killeth a beast shall make it good (*yeshallemennah*), beast for beast (*nefesh taḥat nefesh*).

24. 19. If a man cause a blemish (*mum*) in his neighbour, as he hath done, so shall it be done to him.

24. 20. Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish (*mum*) in a man so shall it be done to him.

24. 21. He that killeth a beast shall make it good (*yeshallemennah*) and he that killeth a man shall be put to death.

24. 22. Ye shall have one *mishpaṭ* for *ger* as for *ezraḥ*. I am JHVH your God.

24. 23. And Moses spake to the *Bne-Israel* that they should bring forth him that cursed out of the camp and stone him with stones. And the *Bne-Israel* did as JHVH commanded Moses.

The maxim refers only to homicide and to maiming. We know the Hebrew law of both. Homicide is either murder, which is a capital offence, or it is manslaughter, which is punishable by a form of imprisonment. Maiming is a form of assault and battery. This offence also has two degrees. It is either simple assault and battery, which is punishable by compensatory damages (Exod. 21. 18, 19), or it is aggravated assault and battery (of which maiming is one kind), which is punishable by vindictive damages to be assessed by the court (*pelilim*) (Exod. 21. 22).

The maxim in any of its forms contradicts the Hebrew law of homicide and of assault and battery. It also contradicts the pre-Hebraic Canaanite law of homicide, and probably of assault and battery, because it excludes *kofer*, or *wergild*, which was a recognized institution, against which the great law reform waged war.

That it was a mere forensic statement appended to the enunciation of a law, with which it had some fancied relation, seems clear enough. The law of Deuteronomy 19 proves it. The offence of perjury in a trial for the capital crime of *sarah* is made capital. The only punishment that could be inflicted was death. It was a new capital crime, and the promulgation of the law itself was followed by the argumentative use of this popular maxim. There could be no question of eye or tooth or hand or foot, and yet we have the whole catalogue. The object is plain.

It is as if the herald who proclaimed the statute had followed up his announcement by reminding them that the perjured witness was only getting his deserts according to the old maxim.

Its use in the Exodus statute is not for any other purpose. I have already indicated that the text is defective. It provides first for the punishment of simple assault and battery, without serious consequences, by compelling the assailant to pay for his victim's cure and for his loss of time (Exod. 21. 18, 19). It then provides for the corporal punishment of an aggravated assault on a slave resulting in death (Exod. 21. 20). Finally it punishes an aggravated assault on a woman which produces the death of an unborn child. The penalty is the payment of vindictive damages, and there the matter ends. That if the woman too should die, corporal punishment would follow, as in cases of manslaughter, is highly probable. By corporal punishment I mean either scourging or imprisonment.

The texts, however, are confused, and are made to say that the death of the unborn child does not change the character of the offence from simple assault to aggravated assault, because no *ason* (mischief, harm) results.

In the teeth of this saying there is the provision for vindictive damages, which is itself the sign that the law considers the injury serious. Then there is, too, the law that manslaughter, the actual killing of a man in hot blood or by casualty, is not to be punished with death.

Keeping this in mind, the idea that a man could be capitally punished who hurt a woman without malice aforethought and without intent even to strike her, is simply inadmissible. One may well suspect that some words

are missing from verse 23, which described an offence of great gravity, and also provided a severe specific punishment for it, and that the maxim was then invoked just as in Deuteronomy. But even if this very probable hypothesis is untrue, the maxim may have been quoted to point a case of damages merely.

This is exactly what has happened in the Leviticus text. He that killeth a beast shall make it good (shall pay for it) (*yeshallemennah*) *nefesh taḥat nefesh.* The Authorized Version translates this leading phrase of the maxim *beast for beast*, instead of life for life. And the translation is a correct rendering of the meaning. It has, however, not been perceived that the text, after it announces a liability to pay money damages, quotes this very maxim by way of support. We have, in effect, a definition which declares that making good by a money payment a loss inflicted, is an instance of the application of the old maxim *nefesh taḥat nefesh* (life for life). And this Leviticus text is the only one of the three which makes maiming (*mum*) a separate form of aggravated assault and battery which is to be punished in kind: 'As he hath done, so shall it be done to him' (Lev. 24. 19). And then follows the rest of the maxim: breach for breach, eye for eye, tooth for tooth.

That this has no other meaning than that money damages adequate to punish for the injury must be assessed against the aggressor, is certainly inferable from the apposition of *yeshallemennah* with *nefesh taḥat nefesh.* So read we have simply the same law as in Exodus 21. 22, that in a case of aggravated assault and battery mere compensation will not suffice, but the judges are to assess vindictive damages against the aggressor proportioned to the gravity of the injury.

There is another thing that must not be overlooked. The maxim in its fullest form is found in the Exodus text, and follows hard on a piece of old Canaanite law (Exod. 21. 22–5). The Hebrew law of assault and battery uniform, that in no event, whatever the result, can the penalty be death where the intent to murder is lacking. Moreover, the cardinal principle of Hebrew law is that everybody is equal before the law. The Code of Ḥammurabi, however, devotes six sections to the case of assault on a pregnant woman (Secs. 209–14). Five of these provide for the payment of compensation only, the sixth (Sec. 210) provides that if the victim be a gentleman's daughter, the assailant's daughter shall be put to death. We have already, in our first lecture, intimated that in later times this provision must have been interpreted, even in Babylonia and Assyria, to mean the payment of punitive damages, in addition to compensation. It is an offshoot of this piece of Babylonian woman-law which has somehow been preserved in our text, though it is in glaring contradiction to every principle of Hebrew law. The reasonable explanation is that among the old documents which went into the compilation of our books, odd pieces of *zikne ha-'ir* law, having in them Canaanite admixtures, crept in and remained undetected, because they had become obsolete in practice.

There is just one other similar piece of Canaanite woman-law with retaliatory features. It is contained in Deuteronomy 25. 11, 12, and contrary to all Hebrew law and practice, prescribes mutilation, the cutting off of the offending hand, as punishment. It is, however, quite in line with the Ḥammurabi Code, which prescribed mutilation in no less than twelve sections (Secs. 192, 193, 194, 195, 196, 197, 200, 205, 218, 226, 253, and 282).

When we find obsolete Canaanite laws thus recorded, we need not be surprised to meet a popular Canaanite legal maxim, which everybody quoted at all times, with no definite meaning, but merely by way of illustration. The fullest version of the maxim accompanies the gravid woman's law of Exodus. In Leviticus the maxim is cut in two. Its first and most significant member, *nefesh taḥat nefesh*, frankly means a money payment, and there is no good reason for attributing to the less significant phrases of the maxim a higher value than to its chief portion. In Deuteronomy its use as a mere illustration is palpably plain.

In determining what punishments were imposed by Hebrew law, we ought not to overlook Ezra's views on the subject. He was a *Kohen* and a thorough adept in the law, 'a ready scribe in the law of Moses'. He was a leader of his people and had very definite ideas on the subject of reconstructing the Jewish state in its pristine glory. He must have been a person of eminence, or otherwise he could not have obtained from Artaxerxes the liberal charter which authorized him practically to rule a new state which he was to found on the site of the old Judea of his fathers, there to administer the Torah of JHVH and to enforce its *ḥoḳ* and *mishpaṭ*. Moreover, in the year 450 B.C., there were better means of knowing and understanding the old law than are accessible to us. That the terms of the charter originated with Ezra, can scarcely be doubted. The document is in Ezra 7. 12–26. These are the words: And thou Ezra, according to the *ḥokmat elahak* which is in thy hands, set judges and *dayyanin* to judge all the people beyond the river for all such as know the laws of thy God, and as to those that

know them not, teach them. And whoever will not do the law of thy God and the law of the King, let judgement (*dinah*) be executed speedily upon him, whether for death (*le-mot*), for banishment (*lishroshi*), for amercement of goods (*la'anash niksin*) or for imprisonment (*esurin*).

The Authorized Version renders *shafṭin we-dayanin*, magistrates and judges. There can be little doubt that the author was translating *shofeṭim we-shoṭerim* (Deut. 16. 18), and that therefore the rendering should be 'judges and officers', *dayyan* being the equivalent of *shoṭer*, who is the official that executes the judgement of the court in the manner of our sheriff.

The Ezra charter enumerates four kinds of punishment for criminal offences.

The Torah knows of six:

Death: (Exod. 21. 12).

Karet: (Gen. 17. 14; Exod. 12. 15, 19; 30. 33, 38; 31. 14, 15; Lev. 7. 20, 21, 25, 27; 17. 4, 9, 14; 18. 29; 19. 5–8, 13, 20; 20. 5, 17, 18; 22. 3; Num. 9. 13; 15. 30, 31; 19. 13, 20).

Amercement: (Exod. 21. 19).

Enslavement: (Exod. 22. 3).

Scourging: (Deut. 22. 18; 25. 2, 3; Lev. 19. 20).

Naḳom yinnaḳem: (Exod. 21. 20).

Two of these six (death and amercement), are plainly specified in the Ezra charter; two others (enslavement and scourging; a slave's punishment) had become obsolete by the emancipation law, leaving for consideration only *Karet* and *naḳom yinnaḳem*, which stand in the place of Ezra's banishment and imprisonment.

That *Karet* in the early ages meant banishment, is probable. The uncircumcised male (Gen. 17. 14) and

the man who flouted the celebration of the Exodus (Exod. 12. 15, 19; Num. 9. 13), were both to be cut off from among their people. These, however, were grave offences against national duty. The rite of circumcision was, in effect, the admission to the citizenship of the nation, while the Passover celebration was the symbol of the nation's birth which every patriot profoundly revered. That a man who failed in these respects was looked upon as a traitor, is not to be wondered at. Exile was not deemed too severe a punishment.

There are, however, many other cases calling for the punishment of *karet* which could not possibly have been punished by exile. Such cases are the following: eating the flesh of *shelamim* offerings while unclean (Lev. 7. 20, 21); eating the fat of a fire-offering (Lev. 7. 25); eating blood (Lev. 7. 27; 17. 14); killing an ox, lamb, or goat in the camp and not bringing it as a *ḳorban* (Lev. 17. 4, 9); compounding an imitation of the holy oil (Exod. 30. 33) or the holy perfume (Exod. 30. 38); eating of *shelamin* offerings on the third day (Lev. 19. 5–8); committing certain improprieties (Lev. 20. 18); eating of the *ḳodashim* while unclean (Lev. 22. 3); failing to purify one's self when unclean (Num. 19. 13, 20).

These are all trespasses which would be adequately punished by temporary seclusion or excommunication. To have banished from the land all persons guilty of these ecclesiastical peccadilloes would have weakened the kingdom.

That *karet* at any time meant the death-penalty is highly improbable. Perhaps the strongest argument in favour of the view that it did, may be derived from the passages Exod. 31. 14, 15. In the former, one who works

on the Sabbath incurs the penalty of *karet*; in the latter, the penalty is death. This, however, warrants no other conclusion than that the latter provision is an amendment of the former. Indeed, there is distinct evidence that the law was changed in some such manner. In Num. 15. 32–6 there is a reported case of a man who gathered sticks on the Sabbath. The authorities seem to have been in doubt whether the offence was punishable. The oracle decided that the penalty must be death by stoning.

The conclusion would seem to be that the punishment of exile for working on the Sabbath was deemed impolitic, and that the death-penalty, which might be expected to prove a more effective deterrent, was at an early date substituted by way of amendment.

Karet may therefore be said to have two meanings, an older and a newer one; the former being exile, and the latter a lighter penalty to be borne at home for a limited period.

Ezra seems to have adopted the older *karet*, that is exile, for his new commonwealth, calling it *sheroshi* (uprooting) in his Aramaic.

Ezra's *esurin* (imprisonment) has no parallel in the older law, unless it be found in the *nakom yinnakem* of Exod. 21. 20.

These words are rendered by the Authorized Version: he shall be surely punished. No substantial objection can be urged against the mere translation of the words. Literal translations, however, are but slight helps to the understanding of technical terms. And that the term in question is technical, there is little room for doubt. It will be remembered that chapter 21 of Exodus contains a code of laws which prescribe specific punishments for

certain offences. For murder, death (21. 12); for smiting a parent, death (21. 16); for cursing a parent, death (21. 17); for injuring a man in a quarrel, compensation (21. 19); for smiting a slave with a rod which produces death, *naḳom yinnaḳem* (21. 20); for producing miscarriage, punitive damages (*ʿanosh yeʿanesh*) (21. 22). The penalties are all specific, and there is no reason to doubt that *naḳom yinnaḳem* is likewise specific. The only difficulty is to discover what it was. That it was something more than punitive damages, is obvious. It must have been something affecting the person of the culprit with some severity. The particular term is unique, there being no other instance of its use. The root-word is, however, common, and it always denotes punishment of a serious character.

In Judges (15. 7 and 16. 28) Samson uses it to mean the slaughter of a multitude. In 2 Kings (9. 7) Elisha uses it to charge Jehu with the duty of destroying the whole house of Ahab. Jeremiah uses it to describe a day of JHVH's signal punishment of enemies (46. 10; 50. 15; 51. 36). By Ezekiel it is used in a similar sense (Ezek. 25. 15), as also in Esther (8. 13).

That it cannot mean death is apparent from two facts: first, the offender did not intend to kill the man, and was therefore guilty only of manslaughter, and second, the same code uses the technical term *mot yumat* in the several cases when the offence is capital. It is true that the Talmud (Sanhedrin 52 b) construed it to mean 'death by the sword'. Its argument, however, though ingenious, falls before the two facts already stated.

Nor is it likely to mean banishment from the land, which is nearly as severe as the death penalty, and is moreover already provided for under the name of *Sheroshi*. The fact

that a new crime was being created by law must not be forgotten. Before this law the fact that the slave died under his master's correction was no man's concern. In the Code of Ḥammurabi the death of the slave rendered the slayer liable to give the bereaved master another slave in his stead. Other consequences there were none. If, therefore, the master lost his slave by his own act, it was his own money he was losing. This is good Babylonian law, and it is one of the ironies of history that when the Hebrew law fought this system, and won its first great triumph over it, the record should be disfigured by the intrusion into it of the Babylonian principle which it had just overcome: 'The slave is but the master's money' (*kaspo hu*) (Exod. 21. 21). It and the *lex talionis* maxim, which follows hard upon it (21. 23–5), are both of them good Canaanite law. They are, however, in direct contradiction of Hebrew law.

On the other hand, it was not to be expected that extreme punishment should be inflicted for an act which men had just begun to look upon as an offence. This view would negative banishment as the punishment meant by *naḳom yinnaḳem.*

Scourging, on the other hand, was in ancient Israel fit punishment only for children, slaves, and paupers, and would not be thought of for men of good condition. Only for one offence, and that an infamous one, was the punishment imposed on a freeman (Deut. 22. 18). And to this effect writes Josephus (*Ant.*, Book 4, ch. 8, Sec. 21): The punishment of stripes is a most ignominious one for a freeman.

It need not therefore be thought of in this connexion. This leaves for consideration only the question of im-

prisonment. There is a very common belief that the ancient Hebrews did not know deprivation of liberty as a punishment for crime. Against the correctness of this supposition there is a mass of evidence which has not been sufficiently weighed.

Very significant is the fact that there are eight several Hebrew words denoting prisons, and, moreover, two of these words are used in varying forms:

1. *ha-maṭṭarah* is used by Jeremiah (32. 2, 8, 12; 33. 11; 37. 21; 38. 6, 13, 28; 39. 14, 15); and Nehemiah (3. 25; 12. 39).

2. *Masger* is used by Isaiah (24. 22; 42. 7); and by the Psalmist (142. 8).

3. *Bet ha-peḳudot* is used by Jeremiah (52. 11).

4. *Bet ha-bor* is used in Exodus (12. 29); and by Jeremiah (37. 16).

The variant form *bor* is used by Isaiah (24. 22); by Jeremiah (38. 6, 7, 9, 10, 11, 13); and most significantly in Proverbs (28. 17): A man oppressed by blood-guilt (*dam-nefesh*) will flee (*yanus*) to the *bor*; let no man stay him.

5. *Mishmar* is used in Genesis (40. 3, 4, 7; 41. 10; 42. 17, 19); in Leviticus (24. 12); in Numbers (15. 34): 'And they put him in *mishmar*, since it was not declared what should be done to him.' In Proverbs (4. 23): 'As in any prison (*mishmar*) guard thy heart; for out of it are the issues of life.'

6. *Bet ha-sohar* is used in Genesis (39. 20, 21, 22, 23; 40. 3, 5).

7. *Bet ha-asirim* (M.T. *asurim*) is used in Judges (16. 21, 25).

The variant form *bet ha-esur* occurs in Jeremiah (37. 15), and the form *bet ha-surim* in Koheleth (4. 14).

8. *Bet ha-kele'* occurs in 1 Kings 22. 27 ; 2 Chron. 18. 26 : Put this man in prison (*bet ha-kele'*) and feed him on bread and water. And Jeremiah uses it (37. 15, 18).

The variant form *bet ha-keli'* (M.T. *bet ha-kelu'*) occurs in Jeremiah 37. 4 ; 52. 31 ; while the form *bet-kele'* is used in 2 Kings (17. 4 ; 25. 27), and in Isaiah (42. 7) : 'To open blind eyes, to bring the prisoner (*assir*) from the *masger*, the dwellers in darkness (*yoshebe ḥoshek*) from the *bet-kele'*.'

Besides these undoubted names for prison, the Authorized Version gives *prison-house* as the rendering of *bet ha-mahpeket*. King Asa being wroth with Ḥanani, the seer (*ro'eh*) put him into the *bet ha-mahpeket* (prison-house) (2 Chron. 16. 10).

When Pashhur, the priest, was angered with Jeremiah for his prophecies, he put him in the *mahpeket* by the upper Benjamin-gate (Jer. 20. 2). A. V. here renders not 'prison', but 'stocks'.

The word occurs but once more. Shemaiah, the Nehelamite, who prophesied in Babylon in a sense contrary to Jeremiah's prophecies at Jerusalem, wrote to the priest in the latter city to put Jeremiah in the *mahpeket* and in the *ṣinoḳ* (Jer. 29. 26), that being the proper place for a *meshugga'* (madman) who prophesies.

This mode of branding a prophet whose utterances are displeasing was not a new thing. Hosea (9. 7), reproaching his age, charges them with calling the *nabi* a fool (*ewil*) and the inspired man (*ish ha-ruaḥ*) a madman (*meshugga'*). And even in our own day the same phenomenon occurs. A statesman who advocates measures we do not like is often called a paranoiac.

The fact is clear that the *mahpeket* is spoken of only in connexion with prophets whose utterances are distaste-

ful to those in power, and who are by the latter branded as madmen. The conclusion would seem to be that the *bet ha-mahpeket* was a place for the detention of lunatics, rather than a house of punishment for criminals. Exactly what *ṣinoḳ* means is doubtful. A. V. renders 'the stocks', but as the word occurs but this once, we can be certain only that it means some place or instrument of restraint.

The common notion that the ancients had no separate institutions for the sick may be questionable. The obscure text (2 Sam. 5. 6, 8), which describes the capture by David of the fortress of Jebus, speaks of the Jebusites' defiant cry to David that unless he could reach the *ṣinnor* and capture the blind and the lame, he would never enter the place. The *ṣinnor* was apparently built on the highest point of what was afterwards the city of David, and the inference is reasonable that it was a place where the blind and the lame were kept. It may be that the *ṣinnoḳ* of Jeremiah and the *ṣinnor* of Samuel are not totally unrelated. Whether the account was historically accurate or was merely legendary by way of explaining the origin of the later law that 'the blind and the lame shall not enter the temple' (*'iwer u-piseaḥ lo yabo el-ha-bayit:* 2 Sam. 5. 8; cp. Lev. 21. 18), is a question. In any event, the narrative seems to indicate familiarity with the idea of segregating persons afflicted with certain infirmities.

There is probably still another name for prison, though the translators have hitherto not recognized it. It is *bet ha-asuppim* (1 Chron. 26. 16). The Authorized Version takes *asuppim* for a man's name, while the Revised Version renders 'the storehouse'.

Sufficient regard has not been paid to the instances

in which *asaph* means 'to imprison'. Joseph put his brothers (*wa-ye'esoph*) into *mishmar* for three days (Gen. 42. 17).

As prisoners are imprisoned, they will be imprisoned in a dungeon, will be shut up in a jail (*we-ussephu asephah assir ʿal-bor, we-suggeru ʿal-masger*) (Isa. 24. 22).

That there was in Jerusalem a house of detention (which we would call a police station), to which persons arrested for trivial offences were consigned, would appear from certain passages in the Song of Songs, and this may have been the puzzling *bet ha-asuppim* of 1 Chron. 26. 16. When the lady of the song dreamed that she went forth by night to look after her beloved, she found him not, but encountered unsympathetic policemen on their beats (*shomerim ha-sobebim ba-ʿir*), who arrested her (*meṣa'uni*). She was, however, soon released (*kimʿaṭ sheʿabarti mehem*) (Song of Songs 3. 3, 4).

The current translations do not say 'they arrested her', but give the rendering 'they found' her, on the theory that *maṣa'*, which usually means to find, does so in this instance. The word also has the meanings to catch, to arrest, to acquire, to take or receive. A burglar caught in the act (Exod. 22. 1 (2)), and a thief caught after the act, are both *yimmaṣe'* (Exod. 22. 6, 7 (7, 8)). The men who caught and jailed the Sabbath-breaker were *moṣe'im wa-yimṣe'u* (Num. 15. 32, 33).

The booty acquired in war is *maṣa'* (Num. 31. 50) All that a man has acquired (his whole estate) is *yimmaṣe'* (Deut. 21. 17).

Here are other instances:

If a man catch (*yimṣa*) his enemy, will he let him go (1 Sam. 24. 19).

They caught (*wayimṣeu*) an Egyptian and brought him to David (1 Sam. 30. 11).

Was Israel caught (*nimṣa'*) among thieves? (Jer. 48. 27).

I will surrender (*mamṣi'*) them each unto his neighbour's hand (Zech. 11. 6).

If the thief be caught (*we-nimṣa*), he must pay sevenfold (Prov. 6. 31).

And he saith: Do not lower him into the pit. I have taken ransom (*maṣa'ti kofer*) (Job 33. 24).

In the Canticles, therefore, the lady dreams that the police arrest her, but do not detain her long (3. 3, 4). In her next dream, however, she is not so fortunate. The policemen not only arrest her, but beat and wound her, and give her in charge to the policemen of the wall (*shomere ha-ḥomot*), who use her roughly, rending her dainty veil or mantle (5. 7). One may well believe that the policemen of the wall had a station to which the policemen arresting persons whom they considered disorderly, took their prisoners. At the station the prisoners were of course examined, and any endeavour to avoid identification by covering the head or face with veil or mantle, would result in damage to the garment.

That the walls of cities were thoroughly policed, and that they had houses built on them, is certain.

I have appointed *shomerim* upon thy walls, O Jerusalem, who will not be inactive (*lo yeḥeshu*) by day or by night (Isa. 62. 6).

When Rabshakeh shouted the menaces of Assyria to the ministers of the king of Judah, the latter prayed him to speak in the Aramaic tongue, so that those on the wall would not understand. Rabshakeh, however, rudely insisted on addressing his menacing words to the *yoshebim*

on the wall, their purport showing that he looked upon them, not as a rabble of idlers, but as having authority to influence Hezekiah's actions (1 Kings 18. 27; Isa. 36. 12).

We may, therefore, fairly conclude that the wall of Jerusalem had a police station to which the *shomerim* brought their prisoners, who were tried by the *yoshebim* there sitting. Such police courts are not otherwise unknown. There was such a court in one of the prisons in the city itself, where the sale of certain land in Anathoth to Jeremiah was duly acknowledged before the *yoshebim* that sat in the prison court (Jer. 32. 12).

Whether the lady of the Canticles was or was not in the police station of her dream-city, is, after all, of no great importance. When we remember that there are at least eight acknowledged names for prison in the Hebrew language, it is no longer to be doubted that the prison was an institution of which everybody had knowledge. Indeed, in the two capital cases for which there was no precedent, and which puzzled Moses and the *'Edah*, the accused were both imprisoned pending the determination of the issue (Lev. 24. 12; Num. 15. 34).

Assuming, then, that imprisonment (deprivation of liberty) was well known to the ancient Hebrews as a mode of preliminary or final punishment, the question arises whether the Exodus Code provides for its imposition. That the loss of liberty was known to the Code would appear from the provision (21. 13) for a *maḳom*, to which one guilty of manslaughter would go. This certainly means that the defendant could not stay at home, that he would have to go to an appointed place and live there.

This is not a bad definition of a state-prison, however the details of its management may differ from those of

analogous modern institutions. That the separated city of Deuteronomy and the *'ir miḳlaṭ* of Numbers, which succeeded the *maḳom*, were prison-cities, we think has been demonstrated. It is not, therefore, difficult to believe that a person whose offence was an inferior kind of man-slaughter, would, as a punishment, be deprived of his liberty for a time.

The *go'el ha-dam* and the *'ir miḳlaṭ* both ceased by the time of Jehoshaphat. *Shofeṭim* and *shoṭerim*, federal appointees, were placed in each canton (*'ir*). If there had been no prisons before, they became indispensable then. The evidence adduced warrants the conclusion that they were not a sudden invention. The tradition implied in the multiple names for the institution, is perhaps better evidence than a direct written statement would be.

In this connexion it is pertinent to quote once more the Proverb (Prov. 28. 17):

A man oppressed by blood-guilt must go to prison. Let no man stay him.

The translation here given is not that of the versions, all of which fail to perceive that the word *bor* in the text means prison, being used in that sense in Exodus (12. 29), by Isaiah (24.22), and by Jeremiah (37.16; 38.6,7,9,10,11,13). So read, it is a popular legal maxim, just as if we would say: Never be bail for a murderer. Indeed, the Septuagint comes very near to adopting this as the translation.

On the whole, it is probable that the man whose slave died under his rod was punished by imprisonment, and that this is what is meant by *naḳom yinnaḳem.*

Before closing the investigation, a word should be said about the passages in Genesis bearing on the subject of homicide (Gen. 4. 8–16; 9. 5, 6). They are, as has been

said, no part of the legal literature. Cain slays his brother, perhaps in the course of a heated argument. So put, the offence was, according to the law of Exodus and the rest, mere manslaughter. The punishment decreed is that he can no longer remain in the land where the offence was committed. He must leave his home and live elsewhere. The terrors of exile are greater than he can bear, and JHVH sets a mark on him which will diminish its perils. The sentence, however, is not modified. Cain left and dwelt in the land of Nod to the east of Eden.

In God's instruction to Noah and his sons after the Deluge, homicide is dwelt upon. He who kills a man must answer for it. Even a beast must answer for the blood of a man. And the whole community is responsible for bloodshed (*mi-yad ish aḥiw edrosh et-nefesh ha-adam*). And then the general principle is laid down: Whoso sheddeth man's blood (*shofek dam ha-adam*), by man shall his blood be shed.

In all this there is nothing to run counter to the Hebrew law of homicide as we have explained it. The words *shofek dam* may be taken in either one of two senses. They may refer to wilful murder, which must be punished by death, or the principle announced may have no reference whatever to human law. The seer, pondering on the problems of the world, may reflect that bloodshed, whether from malice or by misadventure, always brings misfortune in its train. The Talmud has the same philosophy: With what measure ye mete, so shall it be meted unto you (Sotah 8 b). God's justice is measure for measure (*middah ke-neged middah*) (Sanhed. 90 a). And Shakespeare more than once utters a similar thought. In his *Measure for Measure* he makes the Duke say:

'The very mercy of the law cries out
Most audible, even from his proper tongue,
An Angelo for Claudio, death for death,
Haste still pays haste and leisure answers leisure,
Like doth quit like, and measure still for measure.'
(*Measure for Measure*, Act 5, Scene 1.)

And in the third part of *Henry VI* (Act 2, Scene 6), the Earl of Warwick speaks:

'From off the gates of York fetch down the head,
Your father's head, which Clifford placed there.
Instead whereof, let this supply the room;
Measure for measure must be answered.'

Whether the passages be legal or philosophical, or a mixture of both, the law is always kept in view. That a beast must answer with its life for the blood of man, is the express provision of the statute (Exod. 21. 29, 32). That the whole community incurs blood-guilt when one man murders another, has, we think, been proved in the second lecture. That the perpetrator himself must suffer is a thing of course.

One fact should, however, be kept in mind. *Shofek dam* was rather a literary form than a legal term. Isaiah so uses it in describing the general decadence of morals (Isa. 59. 7); Jeremiah does the same (Jer. 7. 6; 22. 3, 17), as does Joel (4. (3). 19). This use has even become proverbial (Prov. 1. 16; 6. 17).

We have now reached the end of our inquiry, and it remains for us to give a brief summary of its results.

About 1280 B.C. Israel, under the leadership of Joshua, crossed Jordan to enter upon the conquest of Canaan. The conflict thus precipitated was not merely physical;

it was in a greater degree political or social, and moral or religious. Two antagonistic systems of life were facing each other. The Canaanites represented the antique civilization of Western Asia; they had cruel gods and cruel laws, despotism prevailed, slavery was the corner-stone of their institutions. The Hebrews, on the other hand, held that freedom was the true basis of a state, and law and justice its purpose. In their scheme despotism had no place. The chiefs of the state, by whatever name known, could not hold office without the assent of the people, nor could they rule by mere will or caprice, but by law.

The Hebrews finally triumphed, though the contest was long and bitter. By the year 1050, a fairly settled commonwealth had been established under the rule of the priest-shophet Eli. He was succeeded by Samuel, in whose time the headship of the state was transferred to a king, Saul of the tribe of Benjamin (*c.* 1020 B.C.). It was not, however, until a quarter of a century later that Israel was thoroughly united under the reign of David.

During the three centuries between the crossing of Jordan and the hegemony of David, the state was being slowly cemented. The numerous city-kingdoms into which it was divided at the conquest, were deprived of their kings and converted into cantons or counties of the state. These were called *'arim* (cities) and were governed by cantonal councils called *zikne ha-'ir*. To these were confided administrative and judicial powers, which were to be exercised in harmony with the federal constitution and laws. The better to effect this purpose, *Levites and nebi'im*, agents of the central government, visited the

several cantons for the purpose of instructing and otherwise aiding the local councils in their work.

These measures, however, did not prove adequate. The subtle influence of native customs and ideas affected the cantons, especially those in the remote districts. The worship of JHVH was neither orthodox nor exclusive. Canaanite ideas, religious and legal, were absorbed, and a hybrid system resulted, which threatened to imperil church and state.

In course of time, certain branches of jurisdiction were withdrawn from the local councils and assumed by the central government. Homicide was not, at first, one of these. It was at a later period that the conflict concerning the law of homicide became acute.

We do not know by direct evidence what the Canaanite law on this subject was. There is, however, indirect evidence. The laws of the Babylonian Ḥammurabi (*c.* 2250 B.C.) are now accessible to us, and from them may be derived a fair estimate of the legal notions prevalent in Western Asia at that early period. The publication, it is true, antedated the crossing of the Jordan by a thousand years, and it might fairly be supposed that they had become, in great part, outworn. Before passing judgement on this point, we must remember that fifteen hundred years after their publication, they were still studied in Assyria, and five hundred years after that were made a text-book in the Babylonian schools. This shows, at least, that the leading principles of the Code were still accepted, however changed it may have been in some of its details. It is true that we have no direct knowledge that the people of Canaan ever accepted this Code. The intrinsic probability that it influenced them is, however,

considerable. Moreover, there are certain Canaanite admixtures in the Torah, which have already been dwelt upon, which seem to point directly to the Ḥammurabi Code.

Our other indirect evidence is the Torah. We know its legal principles, and when we find them in energetic conflict with hostile principles, it is fair to conclude that the latter are derived from the Canaanite law.

Guided by these helps, we infer that by the Canaanite law of homicide, the killing of a man was not a crime cognizable by the state, but a trespass, which gave the family of the deceased a right to redress. There was no inquiry as to the motive, and there were no degrees of liability. This absolute right of redress in prehistoric times was the right to kill the perpetrator or an equally important member of his family. When the perpetrator was killed, a right accrued to his family to seek redress, and so it went on in a continuing series. This state of affairs we call blood-feud or vendetta.

When the Hebrews entered Palestine, this stage had long been passed by the Canaanites. While the blood-feud persisted in theory, it was rendered practically nugatory by the custom of compounding the trespass for money instead of blood. Such money payment was called *kofer*, our English 'wergild'. The procedure apparently was something of this fashion: The bereaved family impleaded the slayer before the *zikne ha-'ir*. The only question before them was whether the accused killed the man; the how or why mattered not. If he was condemned, the representative or *go'el* of the family received a legal warrant to kill him, unless the matter should be properly adjusted. If there was to be chaffering about terms, the culprit

sought sanctuary in a *maḳom*, probably the capital city of his *'ir*, though there is reason to believe that a *maḳom* in any other *'ir* would have availed as a safe place of refuge. From this vantage-point the bargaining was conducted, the *maḳom*-priest being the most likely and convenient intermediary. Unless the culprit and his family were very poor, the matter was usually adjusted. The *go'el* who represented the family, was naturally interested in improving their estate, since, if they came to want, they would look to him for help. The *maḳom*-priest of course expected an offering for his *maḳom*, if he were honest, and if the reverse, a honorarium for his services would not have been unwelcome. These were all the parties concerned, as the state took no cognizance of the crime.

With this law the Hebrew law came in conflict. It declared that homicide could never be a trespass (a mere private injury). It was an offence against God and the state, and its gravity in this aspect was such that all minor interests like those of the family, were wiped out and annulled. The sanctity of human life was the great principle, and it had to be applied thoroughly. Its benefits were accorded to the defence, as well as to the commonwealth. Killing was not necessarily murder. It might have been due to casualty, to misadventure, to an unthinking blow given in hot blood. In such cases it was ranked as manslaughter, for which the punishment was internment away from home in a *maḳom*, or later in a separated city, still later in an *'ir miḳlaṭ*, and finally in a common prison. When the killing was with intent, with malice prepense, it was murder, and the sole penalty was death.

With such principles *kofer* was irreconcilable. No

guilty man could escape by its means. If a murderer, he must die; if a manslayer, he must suffer segregation. Money could not buy off either penalty.

The Canaanite law and the Hebrew law were thus in crass opposition. Use and wont are powerful forces. The *zikne ha-'ir* were affected by them, and murder must often have gone unpunished, save by the enforcement of money damages. The federal legates (Levites and *nebi'im*) doubtless secured some measure of respect for the law. In the turbulent times, before the throne of David became secure, this was probably all that could be accomplished. That great warrior-king, after a life of turbulence, saw clearly that what his kingdom needed was rest. In his solemn charge to his successor, he declared that the word of JHVH had come to him, announcing a son who should be a man of rest (*ish menuhah*), in whose days there should be peace and quietness (*shalom wa-sheket*) in Israel (1 Chron. 22. 8, 9).

And Solomon cherished this ideal. So long as the powerful barons could murder for money, there would be no peace in the land. Then began the earnest and determined course of law reform which we have endeavoured to describe.

The first step was the abolition of the right of sanctuary. As the *go'el* could now drag the murderer from the altar, there was no opportunity for protracted negotiation. The *go'el's* demands, however ruinous, would have to be complied with. However well designed the measure, it did not accomplish its purpose. An ingenious *makom*-priest, an indifferent or perhaps friendly *zikne ha-'ir* council, and a *go'el* keener for money than for blood, could easily manage to defeat the purpose of the government.

The next step was more drastic. The *maḳom* with its priest, and the family *go'el* were all eliminated. The right of sanctuary for homicide was done away with. A new federal officer, the *go'el ha-dam*, was sent to each canton to watch the proceedings and to receive the death-warrant for execution from the *ziḳne ha-'ir*. Separated cities were fixed upon as places to which the convicted murderer would go for his appeal, and if he was a mere manslayer to serve a term.

In this arrangement there was but one weakness. The separated cities had their *ziḳne ha-'ir* who were in friendly relations with many other local councils, and who, moreover, were not free from the taint of Canaanite assimilation.

It would appear that this statute was often evaded by the obstinate adherence of the people to the practice of *kofer*, sometimes in murder and often in manslaughter. There seemed but one way to remove the difficulty and to assure the execution of untainted federal law.

This was the course pursued: Forty-eight cities were selected, jurisdiction over which was to be abandoned by the respective cantons, and ceded to the federal government. These were the Levitical cities, inhabited by persons whose allegiance to the federal government and its laws was unquestionable. From among these the *'are miḳlaṭ* (detention-cities) were selected. The *ziḳne ha-'ir* of these cities were, of course, Levites who were capable and willing to enforce the Hebrew law. A national court (the *'Edah*), sitting at Jerusalem, heard the appeals. In this system every weakness was eliminated, except only that the *ziḳne ha-'ir* of the several cantons were still the court of first instance. True, they had federal assessors (Levites, *Kohanim*) and a federal sheriff (the *go'el ha-dam*),

and one might fairly believe that in such circumstances they could not find a loophole to evade the enforcement of the federal law, especially as there was now an express statute forbidding *kofer*, both in murder and in manslaughter cases.

It is, however, this statute which gives the clue to the defect in the system. The common people, the family *go'el* and the *zikne ha-'ir* were still favourable to the practice of compounding the felony of homicide for money.

That the system, carefully guarded as it was, did not perfectly succeed, may be taken for granted. In more modern times and nearer our own homes, we are not totally free of the sentiment which prefers large damages to convictions for manslaughter. It was Jehoshaphat who finally tore up *kofer* by the roots. I have in a previous lecture described how he abolished the jurisdiction of the *zikne ha-'ir* in cases of homicide, by establishing federal courts and sheriffs in every canton, with a supreme appellate court at Jerusalem.

Thus was the final victory for Hebrew law won after a protracted contest lasting a century. At last, about 850 B.C., every man knew that the element of civil damages or private satisfaction was eliminated from homicide cases, and that the state alone had jurisdiction of this high crime.

And now one final word. I am well aware that there is room to question many of the definitions suggested and hypotheses propounded in these lectures. It would be unreasonable to hope for ready acquiescence in views that run counter to inherited opinions. Many will think the whole scheme of positing a life and death contest

between Canaanism and Hebraism audacious; more, perhaps, will look scornfully upon the endeavour to date one of its most important manifestations, and to trace its progress. With them I have no quarrel. The endeavour has been to look at the facts honestly and without prejudice.

If the labour, which has been one of love, helps an earnest student, here and there, to a better understanding of the Hebrew law of homicide, makes clearer the function and short duration of the *'ir miḳlaṭ*, strips the grisly features from the Avenger of the Blood, and moves the Hebrew *lex talionis* from the solid ground of history towards the shifting sands of fable, it will have accomplished its purpose.